reme Court, U.S.
FILED
107
08-416 OCT 1 - 2008
No. 08- OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

NIELS LAUERSEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Jeffrey L. Fisher
Counsel of Record
Kristina Silja Bennard
DAVIS WRIGHT TREMAINE LLP
Suite 2200
1201 Third Avenue
Seattle, WA 98101-3045
(206) 622-3150

QUESTION PRESENTED

In *Blakely v. Washington*, 542 U.S. 296 (2004), this Court held that the Sixth Amendment's right to jury trial is violated "[w]hen a judge inflicts *punishment* that the *jury's verdict alone* does not allow, [because] the jury has not found all the facts which the law makes essential to the punishment." *Id.* at 304 (quotations omitted; emphasis added).

This petition presents the following question: whether a restitution order under the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A, that is based on factual findings made by the district court by a preponderance of the evidence – rather than on findings by a jury beyond a reasonable doubt or a defendant's admission – violates the Sixth Amendment's guarantee of a jury trial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 4

REASONS FOR GRANTING THE PETITION 8

A. Restitution Orders Under The MVRA Violate The Sixth Amendment's Requirement That Any Fact Increasing A Defendant's Punishment Must Be Proven To A Jury. 9

B. Neither Of The Rationales Offered By Courts To Avoid Applying The *Apprendi* Rule To Restitution Orders Has Merit 12

C. This Court's Review Is Necessary To Force Federal Courts Of Appeals To Abide By The Consequences Of The *Apprendi* Rule. 20

CONCLUSION 23

APPENDIX

Second Circuit Decision (July 1, 2008) 1a

TABLE OF AUTHORITIES

Cases

Apprendi v. New Jersey,
530 U.S. 466 (2000) ..... *passim*

Blakely v. Washington,
542 U.S. 296 (2004) ..... *passim*

Creel v. Comm'r of Internal Revenue,
419 F.3d 1135 (11th Cir. 2005) 13

Cunningham v. California,
549 U.S. 270, 127 S. Ct. 856 (2007) 9, 21

Gall v. United States,
128 S. Ct. 586 (2007) 21

In re Winship,
397 U.S. 358 (1970) 10

Kelly v. Robinson,
479 U.S. 36 (1986) 14, 15

Kimbrough v. United States,
128 S. Ct. 558 (2007) 21

Lauersen v. United States,
541 U.S. 1044 (2004) 6

Lauersen v. United States,
543 U.S. 1097 (2005) 6

Pasquantino v. United States,
544 U.S. 349 (2005) 14

People v. Black,
113 P.3d 534 (Cal. 2005) 20

Ring v. Arizona,
536 U.S. 584 (2002) 17, 20

State v. Clapper,
732 N.W.2d 657 (Neb. 2007) 18

State v. Frawley,
106 P.3d 580 (N.M. Ct. App. 2004) 20

State v. Gomez,
163 S.W.3d 632 (Tenn. 2005) 20

United States v. Adams,
363 F.3d 363 (5th Cir. 2004) 13

United States v. Baggett,
125 F.3d 1319 (9th Cir. 1997) 13

United States v. Bapack,
129 F.3d 1320 (D.C. Cir. 1997) 13

United States v. Bonner,
522 F.3d 804 (7th Cir. 2008) 12, 17

United States v. Booker,
543 U.S. 220 (2005) ..... *passim*

United States v. Carruth,
418 F.3d 900 (8th Cir. 2005) 12, 13, 17, 18

United States v. Einstman,
325 F. Supp. 2d 373 (S.D.N.Y. 2004) 13

United States v. Fountain,
768 F.2d 790 (7th Cir. 1985) 14

United States v. Holland,
380 F. Supp. 2d 1264 (N.D. Ala. 2005) 18, 19

United States v. Johnson,
378 F.3d 230 (2d Cir. 2004) 13

United States v. Lauersen,
2000 WL 675377 (S.D.N.Y. 2000) 5

United States v. Lauersen,
348 F.3d 329 (2d Cir. 2003) 6

United States v. *Leahy*,
438 F.3d 328 (3d Cir. 2006)
(en banc) 13, 16, 17, 18

United States v. Lewis,
492 F.3d 1219 (11th Cir. 2007) 17

United States v. Milkiewicz,
470 F.3d 390 (1st Cir. 2006) 15, 16, 17, 21

United States v. Rand,
403 F.3d 489 (7th Cir. 2005) 11

United States v. Reifler,
446 F.3d 65 (2d Cir. 2006) ..... *passim*

United States v. Rizzo,
349 F.3d 94 (2d Cir. 2003) 7

United States v. Rostoff,
164 F.3d 63 (1st Cir. 1999) 13

United States v. Sosebee,
419 F.3d 451 (6th Cir. 2005) 8, 13, 17

United States v. Thompson,
113 F.3d 13 (2d Cir. 1997) 13

United States v. Visinaiz,
428 F.3d 1300 (10th Cir. 2005) 12, 17

United States v. Williams,
128 F.3d 1239 (8th Cir. 1997) 13

United States v. Williams,
445 F.3d 1302 (11th Cir. 2006) 17

CONSTITUTIONAL PROVISIONS & STATUTES

U.S. CONST. amend VI ..... *passim*

18 U.S.C. § 3613A(a)(1) 14
18 U.S.C. § 3614(a) 14
18 U.S.C. § 3663A 1, 5, 8
18 U.S.C. § 3663A(a) 5, 11, 13
18 U.S.C. § 3663 1
18 U.S.C. § 3664 ..... 3, 7
18 U.S.C. § 3664(a) 5, 11
18 U.S.C. § 3664(e) 6, 11, 12
18 U.S.C. § 3664(f) 5, 14
28 U.S.C. § 1254(1) 1
U.S.S.G. § 5E1.1 5

OTHER AUTHORITIES

S. Rep. No. 104-179, *reprinted in* 1996 U.S.C.C.A.N. 924 14

Laura I. Appleman, *Retributive Justice and Hidden Sentencing*, 68 OHIO ST. L.J. 1307 (2007) 19

Nancy J. King & Susan R. Klein, *Beyond* Blakely, 16 FED. SENTENCING REP. 316 (June 2004) 19

Brian Kleinhaus, Note, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 FORDHAM L. REV. 2711 (2005) 14, 19

Melanie D. Wilson, *In* Booker*'s Shadow: Restitution Forces a Second Debate on Honesty in Sentencing*, 39 IND. L. REV. 379 (2006) 19

PETITION FOR A WRIT OF CERTIORARI

Petitioner Niels Lauersen respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit's opinion, App. 1a-4a, is unreported, although it can be found at 2008 WL 2629158.

JURISDICTION

The Second Circuit issued its decision on July 1, 2008. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the Constitution provides, in relevant part, that "the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed."

The Mandatory Victims Restitution Act of 1996 (MVRA), 18 U.S.C. § 3663A, which augmented and partially superseded the Victim and Witness Protection Act (VWPA), 18 U.S.C. § 3663, provides, in relevant part, that

> (a)(1) [W]hen sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in

addition to . . . any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

. . .

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense—

(A) that is—

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit; or

> (iii) an offense described in section 1365 (relating to tampering with consumer products); and
>
> (B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

Both the MVRA and VWPA are enforced by means of 18 U.S.C. § 3664, which provides, in relevant part, that

> (a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report . . . information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.
>
> . . .
>
> (e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence.

> The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.
>
> (f)(1)(A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

STATEMENT

This case presents a frequently recurring and important question concerning a district court's ability to impose restitution on criminal defendants.

1. Petitioner Niels Lauersen is an obstretician/gynecologist who has delivered thousands of babies and dedicated his professional life to improving women's health care. In 1998, the government filed a multi-count indictment against Petitioner alleging that he fraudulently obtained reimbursement from insurance companies for fertility treatments he performed on patients whose insurance did not cover such treatments by misrepresenting the treatments as procedures that were covered. The indictment included charges of

mail and health care fraud, making false statements related to health care matters, conspiracy, and witness tampering. After fifteen days of trial testimony, the jury deadlocked and failed to return a verdict; the district court granted Petitioner's motion for a mistrial. *United States v. Lauersen*, 2000 WL 675377 (S.D.N.Y. 2000).

In 2000, the government filed another multi-count indictment against Petitioner with the same allegations. After the second trial, the jury found Petitioner guilty on all counts. The district court sentenced Petitioner to 87 months' imprisonment. App. 2a.

The Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3663A, required the district court to order restitution, as well. Specifically, the MVRA provides that a district court must order a defendant convicted of a felony committed through fraud or deceit to pay restitution to any person harmed by the offense of conviction. 18 U.S.C. § 3663A(a)(1), (c)(1). To determine the amount of each victim's loss, the district court directs a probation officer to prepare a presentence report that includes, "to the extent practicable, a complete accounting of the losses to each victim." *Id.* § 3664(a).[1] In the order of restitution, "the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant." *Id.* § 3664(f)(1)(A). Any disagreement "as to the proper

[1] The United States Sentencing Guidelines Manual incorporates the MVRA formula for restitution of the full amount of a victim's loss. U.S.S.G. § 5E1.1(a).

amount or type of restitution shall be resolved by the court by the preponderance of the evidence." *Id.* § 3664(e).

Because the jury made no findings and Petitioner made no admissions as to the amount of restitution or the victims who were entitled to it, the district court made the findings necessary to order restitution. Relying on the presentence report prepared by the government, the district court identified the health insurance companies that qualified as "victims" under the MVRA. The court then determined the amount of loss that it believed each victim suffered, for a total of $3,240,597 in restitution. App. 2a.

2. Petitioner appealed to the Second Circuit, and the government cross-appealed. The Second Circuit agreed with the government that the district court erred in failing to apply a particular sentencing enhancement, and remanded for resentencing, noting that the additional enhancement "create[d] a new circumstance that might well justify a downward departure." *United States v. Lauersen*, 348 F.3d 329, 343 (2d Cir. 2003). Petitioner filed a petition for certiorari, which this Court denied. *Lauersen v. United States*, 541 U.S. 1044 (2004). He then filed a petition for rehearing; this Court ultimately granted the petition, vacated the decision below, and remanded for resentencing in light of *United States v. Booker*, 543 U.S. 220 (2005). *Lauersen v. United States*, 543 U.S. 1097 (2005).

On remand, Petitioner argued that, under *Booker* and *Blakely v. Washington*, 542 U.S. 296 (2004), the Sixth Amendment required the jury to

determine the facts necessary to re-impose a restitution order beyond a reasonable doubt. But the district court rejected his argument. App. 2a. The district court resentenced Petitioner to 70 months' imprisonment; the amount of restitution remained unchanged. App. 2a.

Petitioner appealed the restitution order, continuing to argue that the district court's method of imposing it violated the Sixth Amendment. App. 2a. In an unpublished opinion, the Second Circuit affirmed the restitution order, relying on its earlier decision in *United States v. Reifler*, 446 F.3d 65 (2d Cir. 2006), which held that "*Booker* identifies 'no constitutional requirement that the facts needed for [a] district court's fashioning of a restitution order be found by a jury or found beyond a reasonable doubt.'" App. 3a (quoting *Reifler*, 446 F.3d at 116).

The Second Circuit also rejected Petitioner's challenge to the validity of the facts found by the district court that formed the basis for the amount of restitution. App. 2a. The court of appeals held that under 18 U.S.C. § 3664, the government need only demonstrate the "amount of the loss sustained by the victim" by a preponderance of the evidence. App. 3a. Thus, a district court acts within its discretion in relying on the facts adduced by the government "as long as the record indicates that these facts 'are more likely than not true.'" App. 2a-3a (quoting *United States v. Rizzo*, 349 F.3d 94, 98 (2d Cir. 2003)).

3. This timely petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

The Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A, requires judges to find facts, by a preponderance of evidence, necessary to issue a restitution order. Accordingly, this petition presents an "important and complex question," *United States v. Sosebee*, 419 F.3d 451, 461 (6th Cir. 2005): whether a restitution order, which is based on factual findings made by the district court by a preponderance of the evidence – rather than on findings by a jury beyond a reasonable doubt or a defendant's admission – violates the Sixth Amendment's guarantee of a jury trial.

Federal courts of appeals have acknowledged that this Court's recent Sixth Amendment jurisprudence – particularly *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005) – call into doubt restitution orders based on findings beyond those encompassed by jury verdicts, and a series of dissenting opinions have concluded that the Sixth Amendment precludes such orders. This Court should make clear that the dissenting judges are correct. Restitution is punishment, and when judges impose a restitution order based on facts beyond the jury verdict, they "inflict[] *punishment* that the *jury's verdict alone* does not allow." *Blakey*, 542 U.S. at 304 (emphasis added). To continue to pretend otherwise blinks reality and threatens to undermine the line of Sixth Amendment jurisprudence this Court has worked so hard over the past decade to establish and to require lower courts to take seriously.

A. Restitution Orders Under The MVRA Violate The Sixth Amendment's Requirement That Any Fact Increasing A Defendant's Punishment Must Be Proven To A Jury.

1. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court established a "bright-line rule," *Cunningham v. California*, 549 U.S. 270, 127 S. Ct. 856, 868 (2007), that the Sixth Amendment right to jury trial requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. "[W]hen a judge inflicts *punishment* that the *jury's verdict alone* does not allow, the jury has not found all the facts which the law makes essential to the punishment, . . . and the judge exceeds his proper authority." *Blakely*, 542 U.S. at 304 (citation and quotations omitted; emphasis added); *see also Booker*, 543 U.S. at 232 (defendant's Sixth Amendment right "is implicated whenever a judge seeks to impose a sentence that is *not solely based on facts reflected in the jury verdict* or admitted by the defendant") (quotations omitted; emphasis added).

This Court clarified in *Blakely* that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." 542 U.S. at 303-04 (emphasis in original). Put another way, "the relevant 'statutory maximum' is not the maximum sentence a judge a may impose after finding

additional facts, but the maximum he may impose *without* any additional findings." *Id.* at 304 (emphasis in original). One year later, in *Booker*, this Court applied *Blakely* to the Federal Sentencing Guidelines, reaffirming that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Booker*, 543 U.S. at 244.

While the *Apprendi* rule might sound in isolation like somewhat formalistic incantation, it is necessary to protect "constitutional protections of surpassing importance." *Apprendi*, 530 U.S. at 476. The right to jury trial "ensure[s] [the people's] control in the judiciary." *Blakely*, 542 U.S. at 306. Accordingly, the constitutional requirement that a jury – instead of a judge – find a defendant guilty of each element of a crime "guarantee[s] that the jury . . . stand[s] between the individual and the power of the government." *Booker*, 543 U.S. at 237. The beyond-a-reasonable-doubt rule similarly operates as a "prime instrument" "to safeguard [citizens] from dubious and unjust convictions, with resulting forfeitures of life, liberty *and property*." *In re Winship*, 397 U.S. 358, 362-63 (1970) (quotations omitted; emphasis added). A bright-line rule is necessary to enforce these mutually reinforcing guarantees, for otherwise individuals accused of a crime would be at the mercy of judicial intuition concerning when their liberty or property was subject to undue confiscation. "[T]he very reason the Framers put a jury-trial guarantee in the

Constitution is that they were unwilling to trust the government to mark out the role of the jury." *Blakely*, 542 U.S. at 308.

2. A restitution order under the MVRA runs afoul of the *Apprendi* rule because, after a jury's guilty verdict, additional proceedings are necessary for the district court to ascertain the amount of loss for each victim that was directly and proximately caused by the offense. 18 U.S.C. §§ 3663A(a)(2), 3664(a). A probation officer gathers the facts necessary for the district court to make this determination. *Id.* § 3664(a). Sometimes the number and identity of victims are not revealed until this stage, and defendants have been ordered to pay restitution to victims who were not included in the indictment and never mentioned during the trial or in their guilty plea. *See United States v. Rand*, 403 F.3d 489, 494-95 (7th Cir. 2005) (affirming order of restitution that included payments to individuals not listed in indictment or identified in defendant's guilty plea because "specific victims" need not be identified until post-conviction). Indeed, the plain language of the MVRA indicates that a sentencing court can order restitution for victims who were not the subject of the counts of conviction. 18 U.S.C. § 3663A(a)(2) (defining "victim" of offense as "a person directly and proximately harmed as a result of the commission of an offense . . . including, in the case of an offense that involves as an element a scheme . . . any person directly harmed by the defendant's criminal conduct in the course of the scheme").

To the extent that the defendant contests the facts put forth by the probation officer, the court applies the preponderance of evidence standard. *Id.* § 3664(e). In other words, the facts necessary to establish the amount of the restitution order and who is owed payment, i.e., each victim's loss, need not be proven to a jury beyond a reasonable doubt or admitted by the defendant – far from it, those facts are found by the district court in reliance on "bureaucratically prepared, hearsay-riddled presentence reports" written by probation officers. *Booker*, 543 U.S. at 304 (Scalia, J., dissenting in part). That was the case here – the district court could not have imposed the multi-million dollar punishment of restitution on Petitioner without finding facts, such as the amount of the insurance companies' losses, that were never found by the jury.

B. Neither Of The Rationales Offered By Courts To Avoid Applying The *Apprendi* Rule To Restitution Orders Has Merit.

Despite the clear impact of *Blakely* and *Booker* on the constitutionality of MVRA restitution orders, the courts of appeals that have considered the question have held that such orders do not violate the Sixth Amendment. They have done so, however, under divergent and conflicting rationales.

1. Three circuit courts – the Seventh, Eighth, and Tenth Circuits – reason that restitution under the MVRA does not need to be supported by facts proven to a jury or admitted by the defendant because restitution is not criminal punishment. *United States v. Bonner*, 522 F.3d 804, 807 (7th Cir. 2008); *United States v. Carruth*, 418 F.3d 900, 904

(8th Cir. 2005); *United States v. Visinaiz*, 428 F.3d 1300, 1316 (10th Cir. 2005). According to these Circuits, restitution is "essentially a civil remedy" – not a criminal penalty – because it is "designed to make victims whole, not to punish perpetrators." *Carruth*, 418 F.3d at 904.[2]

In direct conflict with these circuits, the majority of federal courts of appeals properly recognizes that restitution *is* criminal punishment. *E.g.*, *United States v. Leahy*, 438 F.3d 328, 335 (3d Cir. 2006) (en banc) ("restitution ordered as part of a criminal sentence is criminal rather than civil in nature"); *Sosebee*, 419 F.3d at 461; *Creel v. Comm'r of Internal Revenue*, 419 F.3d 1135, 1140 (11th Cir. 2005); *United States v. Adams*, 363 F.3d 363, 365 (5th Cir. 2004); *United States v. Johnson*, 378 F.3d 230, 244-45 (2d Cir. 2004); *United States v. Rostoff*, 164 F.3d 63, 71 (1st Cir. 1999); *United States v. Baggett*, 125 F.3d 1319, 1322-23 (9th Cir. 1997); *United States v. Bapack*, 129 F.3d 1320, 1327 n.13 (D.C. Cir. 1997); *United States v. Thompson*, 113 F 3d 13, 15 n.1 (2d Cir. 1997).

The majority is correct. The MVRA itself refers to restitution as a "penalty," 18 U.S.C. § 3663A(a), and the statute is included in Title 18 of the United States Code, titled "Crimes and Criminal Procedure." *See United States v. Einstman*, 325 F. Supp. 2d 373, 382 (S.D.N.Y. 2004) (noting "element of sophistry in stating that something imposed as part of a sentence in a criminal case is in fact not punishment for the

---

[2] The Eighth Circuit, however, has held that restitution *is* criminal punishment for purposes of the Ex Post Facto Clause. *United States v. Williams*, 128 F.3d 1239, 1241 (8th Cir. 1997).

crime"). Restitution is a mandatory component of the criminal sentence for the crimes to which the MVRA applies, and a sentencing court must order it regardless of a defendant's ability to pay. 18 U.S.C. § 3664(f)(1)(A). If a defendant defaults on a restitution order, a court may revoke his probation or parole to "obtain compliance" with the order. *Id.* § 3613A(a)(1). A court may also impose a prison sentence on a defendant who "knowingly fails to pay" an overdue restitution order. *Id.* § 3614(a).

And while restitution does include a compensatory component in that it restores wrongfully-obtained property or funds to the victim, its primary purpose – both historically and under the MVRA – is to punish the offender. *See* S. Rep. No. 104-179, at 20-21, *reprinted in* 1996 U.S.C.C.A.N. 924 (Senate Report on MVRA referring to restitution as "integral part" of criminal sentencing process); *United States v. Fountain*, 768 F.2d 790, 800 (7th Cir. 1985) (Posner, J.) ("[r]estitution indeed is the earliest criminal remedy"). *See also* Brian Kleinhaus, Note, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 FORDHAM L. REV. 2711, 2717-19, 2725 (2005).

Accordingly, this Court has recognized that "[t]he purpose of awarding restitution" under the MVRA "is to mete out appropriate criminal punishment." *Pasquantino v. United States*, 544 U.S. 349, 365 (2005). *Pasquantino* is consistent with earlier precedent, in which this Court held that

restitution imposed as part of a state criminal sentence was a "penalty" that could not be discharged in bankruptcy proceedings. *Kelly v. Robinson*, 479 U.S. 36, 46-49 & n.10 (1986). This Court observed that "[a]lthough restitution does resemble a judgment 'for the benefit of' the victim," it is imposed in the context of a criminal sentence, and "[t]he criminal justice system is not operated primarily for the benefit of victims." *Id.* at 52. Restitution is a "*criminal sanction*" that is intended to fulfill a state's responsibility "to protect its citizens by enforcing its criminal statutes." *Id.* (quotations omitted; emphasis added).

2. A majority of circuit courts not only correctly acknowledge the penal nature of restitution, but some recognize that "[a] literal application of [this] Court's language" in *Blakely* and *Booker* "might suggest" that Sixth Amendment challenges have merit. *United States v. Milkiewicz*, 470 F.3d 390, 403 (1st Cir. 2006); *see also Reifler*, 446 F.3d at 116 ("It might seem from . . . statements [in *Blakely* and *Booker*] that the district court would exceed its proper authority in making the posttrial determinations that are prerequisites to a valid order of restitution."). Indeed, "[i]f the question is whether the verdict '*alone*' allows the judge to impose restitution with no additional finding of fact" – as *Blakely* requires – "obviously, it doesn't." *Milkiewicz*, 470 F.3d at 403 (quotations and alteration omitted; emphasis in original). Rather, the fixing of the restitution amount "calls for fact-gathering by the probation officer after conviction." *Id.* Therefore, "it can reasonably be argued that the 'maximum' amount of restitution based solely on the

fact of conviction is zero dollars." *Id.* Because any "increase in that amount depends upon additional facts," it can be argued that *Blakely* and *Booker* "require[] such findings to be made by a jury." *Id.*

Nevertheless, these courts have held that restitution orders do not implicate the Sixth Amendment because the MVRA does not prescribe any statutory maximum restitution. Specifically, these courts reason that "the *Apprendi* principle is violated when the judge relies on facts not reflected in the jury verdict or admitted by the defendant to impose a sentence above the 'maximum' authorized for the admitted or jury-established facts." *Reifler*, 446 F.3d at 118. In contrast to the "determinate sentencing systems" in *Blakely* and *Booker*, in which a jury finds facts that support a conviction and that conviction authorizes the imposition of a sentence within a specified range, *id.* at 117, the MVRA is an indeterminate system, *id.* at 118. While the MVRA is triggered by facts beyond the jury verdict and makes restitution mandatory, it "fixes no range of permissible restitutionary amounts and sets no maximum amount of restitution that the court may order." *Id.* Therefore, the "*Booker-Blakely* principle that jury findings . . . establish the 'maximum' authorized punishment has no application to MVRA orders of restitution." *Id.*

The Third Circuit has put this argument slightly differently. That court reasoned that a conviction "authoriz[es] restitution of a specific sum, namely the 'full amount of each victim's loss'; when the court determines the amount of the loss, it is merely giving definite shape to the restitution

penalty born out of the conviction." *United States v. Leahy*, 438 F.3d 328, 337 (3d Cir. 2006) (en banc). *Accord Milkiewicz*, 470 F.3d at 404 ("the jury's verdict automatically triggers restitution in the full amount of each victim's losses") (quotations omitted); *United States v. Williams*, 445 F.3d 1302, 1310-11 (11th Cir. 2006), *abrogated on other grounds*, *United States v. Lewis*, 492 F.3d 1219 (11th Cir. 2007); *Sosebee*, 419 F.3d at 461-62. *See also Bonner*, 522 F.3d at 807 (relying on "statutory maximum" argument as alternative holding); *Carruth*, 418 F.3d at 904 (same); *Visinaiz*, 428 F.3d at 1316 (same).

Dissenting judges in the Third and Eighth Circuits, however, have correctly recognized the flaw in these decisions: they do not heed *Blakely*'s definition of "statutory maximum" as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." 542 U.S. at 303 (emphasis in original); *see also Ring v. Arizona*, 536 U.S. 584, 602 (2002) ("If a State makes an increase in a defendant's authorized *punishment* contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.") (emphasis added). Accordingly, as the five judges dissenting from the Third Circuit's en banc decision in *Leahy*[3] explained, the relevant question is not whether

---

[3] Three of the seven judges casting votes for the majority opinion concurred in the judgment only. *Leahy*, 438 F.3d at 339 (Sloviter, Fisher, and Barry, JJ., concurring in judgment only).

> returning ill-gotten gains should be construed as increasing the sentence authorized by a conviction. Rather, the question is whether the verdict "*alone*" allows the judge to impose restitution with no additional findings of fact. Obviously, it doesn't. Notwithstanding the jury's verdict, no restitution can be imposed absent a judicial determination of the amount of loss.

438 F.3d at 342 (McKee, J., dissenting, joined by Rendell, Ambro, Smith, and Becker, JJ.) (quotations omitted; emphasis in original).

Put another way, "[t]he fact that the jury's verdict authorizes restitution in the full amount of the victim's loss by no means allows any restitution to be imposed at all '*without* any additional findings.'" *Id.* at 343 (emphasis in original). Therefore, "[r]estitution in any amount greater than zero clearly increases the punishment that could otherwise be imposed." *Id.* at 344; *accord Carruth*, 418 F.3d at 906 (Bye, J., dissenting) ("the notion *Apprendi* does not apply to restitution because restitution statutes do not prescribe a maximum amount . . . is no longer viable in the post-*Blakely* world which operates under a completely different understanding of the term prescribed statutory maximum"); *see also State v. Clapper*, 732 N.W.2d 657, 666 (Neb. 2007) (Connolly, J., dissenting) ("There is no question that . . . a jury does not find the relevant facts regarding restitution."); *United States v. Holland*, 380 F. Supp. 2d 1264, 1271 (N.D. Ala. 2005) (after *Booker* "restitution orders can no

longer be entered . . . unless and until a jury finds that the Government has met its burden of proving (1) that the defendant's conduct caused the victim's loss, and (2) the amount of the victim's compensable loss").

Commentators agree that the facts necessary for a restitution order under the MVRA must be admitted by the defendant or proven to a jury beyond a reasonable doubt. *See* Laura I. Appleman, *Retributive Justice and Hidden Sentencing*, 68 OHIO ST. L.J. 1307, 1384 (2007) (if restitution is a criminal penalty, "then the rule of *Blakely* logically applies – and as such, requires . . . factual determinations currently performed by either the trial court or the probation department to be determined by a more democratic body"); Melanie D. Wilson, *In* Booker*'s Shadow: Restitution Forces a Second Debate on Honesty in Sentencing*, 39 IND. L. REV. 379, 407 (2006) ("When a judge orders restitution in any amount above the amount of the victims' losses reflected in the jury's verdict or admitted by the defendant, she violates the rule in *Apprendi* and *Booker*."); Kleinhaus, *supra*, at 2755-59. *See also* Nancy J. King & Susan R. Klein, *Beyond* Blakely, 16 FED. SENTENCING REP. 316, 317 (June 2004) ("*Blakely* has thrown into doubt those decisions authorizing judges to make findings necessary for . . . restitution awards"). Simply put, the "MVRA violates the Sixth Amendment and . . . circuit courts are misapplying the principles of *Booker* in concluding that the MVRA remains unaffected by that decision." Wilson, *supra*, at 381.

C. This Court's Review Is Necessary To Force Federal Courts Of Appeals To Abide By The Consequences Of The *Apprendi* Rule.

While this Court often resists granting review of an issue when there is no conflict among the federal courts of appeals, this Court, for two reasons, should not hesitate to grant review here.

1. The pattern of lower courts' responses to this Court's *Apprendi* jurisprudence makes it highly unlikely that a conflict will develop here. Indeed, time and again, lower courts have refused to follow the implications of *Apprendi* until this Court has required them to do so. For example, the federal courts of appeals uniformly concluded following *Apprendi* and *Ring v. Arizona*, 536 U.S. 584 (2002), that the Sixth Amendment did not apply to the Federal Sentencing Guidelines. *See Blakely*, 542 U.S. at 320 (O'Connor, J., dissenting) (collecting cases). State courts – with a single exception – concluded the same with respect to state determinate sentencing systems. *Id.* Yet this Court held in *Blakely* and *Booker* that, following *Apprendi*, it was "clear" that these sentencing systems ran afoul of the Sixth Amendment. *Booker*, 543 U.S. at 232. Even after those unequivocal decisions, some state courts refused to implement *Apprendi*. *People v. Black*, 113 P.3d 534 (Cal. 2005), *cert. granted and judgment vacated*, 127 S. Ct. 1210 (2007); *State v. Frawley*, 106 P.3d 580 (N.M. Ct. App. 2004), *cert. granted and judgment vacated*, 127 S. Ct. 1214 (2007); *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005), *cert. granted and judgment vacated*, 127 S. Ct. 1209 (2007). This Court again had to grant certiorari to force those

courts to toe the line. *See Cunningham*, 127 S. Ct. at 868-71. And most recently, the federal courts of appeals lined up in opposition to the advisory system this Court announced in *Booker*. This Court granted certiorari to remind those courts of what it held in *Booker*. *See Gall v. United States*, 128 S. Ct. 586, 594 (2007); *Kimbrough v. United States*, 128 S. Ct. 558, 565-66 & n.4 (2007).

There is little doubt about what is going on here. Despite acknowledging that "[a] literal application of [this] Court's language" in *Blakely* and *Booker* dictates the conclusion that federal restitution orders violate the Sixth Amendment, *Milkiewicz*, 470 F.3d at 403, the federal courts of appeals refuse to take any step (no matter how clearly required) that would upset current sentencing norms until this Court orders them to do so. The time has come for this Court to step in.

2. No benefit could be gained from further percolation. While no conflict has developed, the majority of circuits have weighed in on the issue and exhaustive dissenting opinions have been written. Commentators also have studied the issue at length. All that is left is for this Court to resolve the issue and clarify that the "bright-line rule" of *Apprendi* – further developed in *Blakely* and *Booker* – means what it says and applies to any fact that increases a defendant's punishment, including any restitution he must pay.

* * * * *

One final note is in order. This Court has granted certiorari in *Oregon v. Ice*, No. 07-901, and

will hear argument in the case this October. The question presented in *Ice* is whether the *Apprendi* doctrine applies to findings of fact that are necessary for a court to impose consecutive sentences for two or more convictions. There is some overlap between the argument Oregon and 17 other States (as *amici curiae*) advance in *Ice* and those that courts of appeals have advanced to reject *Apprendi* challenges to restitution orders.

Specifically, the State of Oregon argues that *Apprendi* is not violated if a judge finds the facts necessary to impose consecutive sentences because such sentences do not exceed the maximum punishment for each *separate* offense of conviction. Petitioner's Reply Br., at 18 ("although consecutive sentences increase a defendant's aggregate punishment, they do not exceed the statutory maximum for any of the underlying individual offenses, because the jury convicted him of more than one crime"). In other words, Oregon contends that the "jury trial right" does not apply to a finding necessary to impose consecutive sentences because such a finding is not "functionally an element of a specific offense." Petitioner's Br., at 14. This argument echoes the Second Circuit's strained holding that the *Apprendi* rule does not apply to facts beyond the jury's finding of guilty that support an order of restitution even though such facts are "prerequisites to a valid restitution order." *Reifler*, 446 F.3d at 116.

In fact, seventeen states filing as *amici curiae* explicitly recognized the impact *Ice* could have on restitution orders. If Oregon Supreme Court's

decision is left standing, they argue, "*Apprendi* would govern decisions whether to . . . require restitution" because "a person who is both incarcerated and ordered to pay . . . restitution is exposed to greater punishment than a person who is only incarcerated" and "often requires specific factual determinations that lie outside the jury's verdict." *Amici Curiae* Br. of Indiana et al., at 3, 12. At the very least, therefore, this Court should hold this case pending the outcome in *Ice*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Jeffrey L. Fisher
Counsel of Record
Kristina Silja Bennard
DAVIS WRIGHT TREMAINE LLP
Suite 2200
1201 Third Avenue
Seattle, WA 98101-3045
(206) 622-3150

September 29, 2008

United States Court of Appeals
for the Second Circuit
No. 05-1458-cr

- -

UNITED STATES OF AMERICA,

Appellee,

-v.-

NIELS LAUERSEN,

Defendant-Appellant.

- -

July 1, 2008

David M. Samel, New York, NY, *for Defendant-Appellant.*

Michael M. Rosensaft, Assistant United States Attorney (Michael J. Garcia, United States Attorney, *on the brief*; Celeste L. Koeleveld, Assistant United States Attorney, *of counsel*), United States Attorney's Office for the Southern District of New York, New York, NY, *for Appellee.*

Appeal from a judgment of conviction entered by the United States District Court for the Southern District of New York (William H. Pauley III, *Judge*).

SUMMARY ORDER

UPON CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is **AFFIRMED**.

A jury convicted defendant-appellant Niels Lauersen of health care fraud in violation of 18 U.S.C. § 1347, mail fraud in violation of 18 U.S.C. § 1341, making false statements relating to health care matters in violation of 18 U.S.C. § 1035(a), conspiracy to commit the foregoing offenses, *see* 18 U.S.C. § 2, and witness tampering in violation of 18 U.S.C. § 1512(b). On October 15, 2001, the District Court sentenced Lauersen principally to 87 months' imprisonment and restitution, as required by statute, *see* 18 U.S.C. § 3663A, in the amount of $3,240,597.00. On February 18, 2005, following a remand for resentencing pursuant to *United States v. Booker*, 543 U.S. 220 (2005), and *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), the District Court resentenced Lauersen principally to 70 months' imprisonment. The amount of restitution ordered, which was by statute required to reflect "the full amount of each victim's losses," *see* 18 U.S.C. § 3664(f)(1)(A), remained at $3,240,597.00. Lauersen now appeals the order of restitution only. We assume the parties' familiarity with the facts and the procedural history of the case.

Lauersen contends that the District Court's "order of restitution violated his Sixth Amendment right to be punished only upon fact-findings made by a jury beyond a reasonable doubt or admitted by him" because the amount of restitution was based solely upon facts found by the District Court by a preponderance of the evidence. Plaintiff's Br. 7. He also challenges the validity of the facts found by the District Court, contending that the record contains "particular facts casting doubt on the accuracy" of

the loss amount on which the District Court based its order of restitution. *Id.* at 16.

We have determined previously that *Booker* identifies "no constitutional requirement that the facts needed for [a] district court's fashioning of a restitution order be found by a jury or found beyond a reasonable doubt." *United States v. Reifler*, 446 F.3d 65, 116 (2d Cir. 2006). Lauersen invites us to reconsider this holding in light of *Cunningham v. California*, 549 U.S. 270 (2007). Because *Cunningham* contains no language suggesting that the "principle that jury findings[] or admissions by the defendant[] establish the 'maximum' authorized punishment has [any] application to . . . orders of restitution," *Reifler*, 446 F.3d at 118, we decline to do so. We therefore reject Lauersen's first argument pursuant to *Reifler*.

"We review a district court's order of restitution generally for abuse of discretion." *Id.* at 120. "We will find such an abuse of discretion if the district court applies legal standards incorrectly[,] . . . relies upon clearly erroneous findings of fact, or proceeds on the basis of an erroneous view of the applicable law." *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 500 F.3d 111, 119 (2d Cir. 2007) (internal quotation marks omitted).

By statute, the Government bears the "burden of demonstrating[, by a preponderance of the evidence,] the amount of the loss sustained by the victim as a result of the evidence." 18 U.S.C. § 3664. Under this standard, a district court acts within its discretion in crediting the sentencing facts adduced

by the Government as long as the record indicates that these facts "are more likely than not true." *United States v. Rizzo*, 349 F.3d 94, 98 (2d Cir. 2003).

Lauersen points to several small errors in the Government's calculation. Review of the record, however, indicates that the District Court took these errors into account when arriving at its findings of the actual and intended loss associated with Lauersen's offenses of conviction.

Having found no error in the District Court's application of the law, and no clear error in the District Court's findings of fact, we AFFIRM the judgment of the District Court.